

FILED
SUPREME COURT
STATE OF WASHINGTON
11/3/2017 3:54 PM
BY SUSAN L. CARLSON
CLERK

Supreme Court No. 94681-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

JEROME CURRY, JR., Respondent

SUPPLEMENTAL BRIEF OF RESPONDENT

Marie Trombley
WSBA 41410
PO Box 829
Graham, WA
253-445-7920

TABLE OF CONTENTS

I.	ISSUE	1
II.	STATEMENT OF FACTS.....	1
III.	ARGUMENT.....	1
IV.	CONCLUSION	9

TABLE OF AUTHORITIES

Washington Cases

<i>State v. Coley</i> , 180 Wn.2d 543, 326 P.3d 702 (2014), <i>cert. denied</i> , 135 S.Ct. 1444 (2015)	8
<i>State v. Luvene</i> , 127 Wn.2d 690, 903 P.2d 960 (1995)	3, 8
<i>State v. Madsen</i> , 168 Wn.2d 496, 229 P.3d 714 (2010)	2
<i>State v. Modica</i> , 136 Wn. App. 434, 149 P.3d 446 (2006)	3
<i>State v. Rohrich</i> , 149 Wn.2d 647, 71 P.3d 638 (2003)	9
<i>State v. Woods</i> , 143 Wn.2d 561, 23 P.3d 1046 (2001)	3

Federal Cases

<i>Faretta v. California</i> , 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)	1
<i>Johnson v. Zerbst</i> , 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.1461 (1938)	2

Constitutional Provisions

U.S. Const. Amend. IV	1
-----------------------------	---

U.S. Const. Amend. XIV	1
Wash. Const. art. 1, § 22	1, 8

I. ISSUE

Whether a defendant's request to represent himself is equivocal where he states he would prefer to proceed with his assigned counsel but for the fact the trial date would need to be extended in order for counsel to prepare for trial.

II. STATEMENT OF FACTS

Mr. Curry relies on the statement of facts provided in his opening brief and his response to the petition for review. Facts will be referenced as needed in the Argument section of this supplemental brief.

III. ARGUMENT

The Sixth and Fourteenth Amendments to the United States Constitution guarantee that any individual brought to trial in a state or federal court must be afforded the right to assistance of counsel. Implied within the guarantee is the right to self-representation.

Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Article 1, § 22 of the Washington Constitution explicitly guarantees an accused the right to defend in person or by counsel¹.

¹ Art. I § 22 provides in pertinent part: In criminal prosecutions the accused shall have the right to appear and *defend in person, or by counsel*, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify

The inherent tension between the right to defend in person and the right to defend by counsel is partially resolved by the direction to trial courts to “indulge in every reasonable presumption against a defendant’s waiver of his right to counsel.” *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.1461 (1938).

To that end, the Courts have drawn lines to assist the trial court in the complexity of resolving a pro se request. A court may deny a defendant the right to self- representation where there is an identifiable fact showing the “request is equivocal, untimely, involuntary, or made without a general understanding of the consequences.” *Madsen*, 168 Wn.2d at 504-505.

At issue in this matter is whether Mr. Curry’s request to defend in person was equivocal and whether the trial court abused its discretion in granting the motion for self-representation in the face of that equivocality.

A defendant’s request to proceed pro-se is equivocal where it is actually an expression of frustration with a delay of his trial,

in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases

rather than a true desire to proceed without an attorney. *State v. Modica*, 136 Wn. App. 434, 442, 149 P.3d 446 (2006); *State v. Woods*, 143 Wn.2d 561, 585-87, 23 P.3d 1046 (2001); *State v. Luvene*, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995).

A review of the court's colloquy with Mr. Curry is essential to answer the question of whether his request was based on a true desire to proceed without an attorney, rather than a mere frustration with a trial delay. In its initial questioning, the court asked Mr. Curry about his request for self-representation:

THE COURT: Thanks. To continue then, Mr. Curry, you wish to represent yourself in each of these three matters; is that right?

THE DEFENDANT: ***Basically I have no choice***, because I'm ready for trial, but I have not gotten all the materials that I need for trial, so I've got to go with what I got. So, yes, I'm ready for trial.

THE COURT: Before we hear in detail from you your reasons why you wish to represent yourself....

5/7/15 RP 4.

The court questioned whether Mr. Curry understood the jeopardy he faced if convicted. 5/7/15 RP 7. Receiving a confirmation of understanding, the court moved on:

THE COURT: And if you can tell me in some detail, I know you've spoken briefly about this a moment ago, your reasons

why you believe it's preferable to represent yourself. And you may want to talk about why you're dissatisfied with your current counsel when you speak about that. So, please proceed with that.

THE DEFENDANT: Well, we have different issues going on with how to fight cases and -- and it's like ***I don't want it to be delayed anymore***, because I have obligations that I need to continue from on the streets. And, you know, if I can't continue my obligations that I need to do, you know, I might as well just do them myself. I can do bad by myself.

5/7/15 RP 6-7.

The court went on to review Mr. Curry's recent criminal trial where he had standby counsel and was convicted on two charges. Mr. Curry had been appointed appellate counsel and the matter was remanded for correction of the community custody time.

5/7/15 RP 9-10, 18. The court reiterated its concerns about Mr. Curry understanding that he would be held to the limitations and rules of the trial court and stated, "This hearing today is just to see whether or not you are equipped sufficiently to be able to represent yourself." Mr. Curry answered, "I'm basically --- I'm not equipped, *but I have no choice.*" 5/7/15 RP 12.

The court specifically queried Mr. Curry on the issue of whether this was a true desire to proceed without an attorney or was simply a time issue.

THE COURT: Okay. You've talked about why in general you don't want an attorney, and **you say you have no choice. Is that mainly because of the time factor**, your attorney is telling you he hasn't had enough time to prepare for the current dates or what's the particular difficulty?

THE DEFENDANT: Basically, he's taking over Alison McPeck on the case, and she was moved to some different part of the public defender's office. I was on a stay hearing. And there was evidence that I was trying to get, and it's like I was – all the (sic) sudden she's just off my case, you know, so I have issues with the public defender's office because of that.

THE COURT: I can understand that, but *what issues do you have with Mr. Elston?.....*

THE DEFENDANT: Because I basically, I mean, ***if I've got to sit and wait until the end of June, I might as well go ahead by myself.*** Because I -- I mean, send me to prison or release me. One of the two. I mean, ***I ain't got time to sit here.*** I mean, I have obligations on the streets. I'm losing my home. And if I've got to lose my home, ***I might as well defend my own self.***

THE COURT: Okay. And I recall you saying substantially that earlier. Let's say Mr. Elston informs you and the court and the prosecutor that he is willing and able to do the best he can on the current trial dates, what's your response to that?

THE DEFENDANT: For June 1st, there's no way.

THE COURT: I'm not sure I understand your response. You've got trial dates set, right, June 1st, and on all matters, with pretrials of May 15th. ***So, if your counsel says, yes, he will be ready to represent you on that date, are you saying you still prefer to represent yourself or something else?***

THE DEFENDANT: ***If he's ready on June 1st, we have no problem.*** But, I mean, there's evidence that we can't get, because we're being delayed on that.

5/7/15 RP 13-14.

The court further clarified:

THE COURT: You're facing a lot of downside here if convicted, given your points that you currently have, as I understand it, and the danger of being convicted of these matters would result in a lot of prison time. So, I don't think it's a very wise choice, number one. *So, with that in mind, if your counsel says **he is willing to do the best he can on June 1st, I think I understand you to say that that would be fine with you, and you would prefer to keep Mr. Elston.***

THE DEFENDANT: ***Yes, but at -- if we've got to go past June 1st, I'd rather just do it myself.*** I mean....

5/7/15 RP 14.

THE COURT: And is this a voluntary decision just from your own thinking about it?

THE DEFENDANT: Sort of, kind of, yes.

5/7/15 RP 15.

In summing up the discussion:

THE COURT: Okay. And to continue on, Mr. Curry has had the benefit of that experience. And it sounds as though, at least as we speak, it's been a partially successful effort on Mr. Curry's part. In reference to representation by counsel, the court is aware of Mr. Elston's background. I know him to be a careful, diligent legal practitioner. I'm confident that he would give his very best effort towards becoming adequately prepared to represent Mr. Curry if that were the outcome here today. At the same time, Mr Curry is saying he's -- he

would ***prefer to represent himself given the current dates and time frames*** of these particular matters before the court. Mr. Curry further indicates that he's aware that there are dangers and pitfalls of self-representation, as I've described. Is that right, Mr. Curry?

THE DEFENDANT: Yes.

THE COURT: Nonetheless, he indicates it's his voluntary and steadfast decision at this time to proceed.

THE DEFENDANT: Well, ***it's not voluntary.***

THE COURT: Pardon me?

THE DEFENDANT: ***It's not voluntary. It's I have no choice in the matter.***

THE COURT: Well, it's either your freewill choice of doing this, or somehow there's been some pressure put on you. And ***the only pressure I recall you saying is the time pressure; that is, that you believe you don't have a choice because you don't want an extension of the trial date,*** since you have other affairs that you believe you need to take care of. And you'd rather have an outcome quicker rather than later on. That's what I understand you to say. Is that accurate?

THE DEFENDANT: That's -- that's accurate.

THE COURT: Okay. So, with all that, the court finds it is appropriate to permit Mr. Curry to represent himself.

(5/7/15) RP 18-19.

Mr. Curry's colloquy with the court, in the context of the record as a whole, demonstrated equivocation. The record shows he knew he was unequipped, did not have the necessary discovery,

and felt he “had no choice” but to represent himself because of a potential delay of the trial date.

Most significant to answering the question of equivocation, Mr. Curry twice agreed with the court that if his attorney were ready within the speedy trial timeframe he would *prefer* to be represented.

The decision in this matter follows this Court’s direction in *Luvane*, 127 Wn.2d 690. In *Luvane*, the Court reasoned that taken in the context of the record as a whole, the statements were expressions of frustration about a delay in going to trial and not an unequivocal assertion of his right to self-representation. Like *Luvane*, Mr. Curry’s statements reflected an overriding and singular interest in avoiding a delay rather than a considered decision about waiving his right to counsel and representing himself on felony charges.

The State has taken the position that the Court of Appeals has substituted its judgment for that of the lower court. This is incorrect. Mr. Curry is constitutionally entitled to a review of the trial court’s decision. Art. I, § 22. The appellate court reviews a trial court’s decision on granting a motion for waiver of counsel for abuse of discretion. *State v. Coley*, 180 Wn.2d 543, 559, 326 P.3d 702 (2014), *cert. denied*, 135 S.Ct. 1444 (2015). A reviewing court

will reverse such a decision if it is manifestly unreasonable, relies on unsupported facts, or applies an incorrect legal standard. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

The legal standard for granting a motion to proceed pro se requires an unequivocal request. The trial court here abused its discretion in granting the motion because the request was patently equivocal.

IV. CONCLUSION

Mr. Curry respectfully asks this Court to affirm the decision of the Court of Appeals.

Dated this 3rd day of November 2017.

Respectfully submitted,

Marie Trombley

WSBA 41410
PO Box 829
Graham, WA 98338
253-445-7920
marietrombley@comast.net

CERTIFICATE OF SERVICE

I, Marie Trombley, certify under penalty of perjury of the laws of the State of Washington and the United States, that on November 3, 2017, I sent an electronic copy, by prior agreement between the parties, or sent by USPS mail, first class, postage prepaid, a true and correct copy of the Supplemental Brief of Respondent to the following:

EMAIL: Brian O'Brien, Spokane Prosecuting Attorney
scpaappeals@spokanecounty.org

Jerome Curry
c/o Marie Trombley
marietrombley@comcast.net

Marie Trombley

WSBA 41410
PO Box 829
Graham, WA 98338
253-445-7920
marietrombley@comast.net

MARIE TROMBLEY

November 03, 2017 - 3:54 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94681-7
Appellate Court Case Title: State of Washington v. Jerome Curry, Jr.
Superior Court Case Number: 14-1-04668-6

The following documents have been uploaded:

- 946817_Briefs_20171103155406SC275191_4116.pdf
This File Contains:
Briefs - Respondents Supplemental
The Original File Name was Curry Supplemental Brief Respondent .pdf

A copy of the uploaded files will be sent to:

- bobrien@spokanecounty.org
- scpaappeals@spokanecounty.org

Comments:

Sender Name: Valerie Greenup - Email: valerie.mtrombley@gmail.com

Filing on Behalf of: Marie Jean Trombley - Email: marietrombley@comcast.net (Alternate Email:)

Address:
PO Box 829
Graham, WA, 98338
Phone: (253) 445-7920

Note: The Filing Id is 20171103155406SC275191